Tan Sri Musa bin Dato' Hj Hassan & Ors v Uthayakumar a/l Ponnusamy

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-80 OF 2009
KN SEGARA, MOHD HISHAMUDIN JJCA AND ABDUL AZIZ ABDUL RAHIM J
9 MARCH 2011

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Civil Procedure — Striking out — Application to strike out plaintiff's claim — Appeal against — Claim against Inspector General of Police, AG of Malaysia and government for damages in tort of defamation — Whether defamatory statements referred to plaintiff or only to organisation — Whether plaintiff's claim disclosed reasonable cause of action — Whether plaintiff's claim sustainable — Whether plain and obvious case for striking out plaintiff's claim — Rules of the High Court 1980 18 r 19(1)(a), (b) & (d)

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Uthayakumar a/l Ponnusamy ('the plaintiff'), an advocate and solicitor of the High Court of Malaya, was at all material times the legal advisor of the Hindu Rights Action Force ('Hindraf'), an organisation that advocates the rights of marginalised Indians in Malaysia. On 25 November 2007, the plaintiff and Hindraf organised a massive street rally in Kuala Lumpur to express discontent as to the treatment of Malaysian Indians by the Government of Malaysia. Thereafter, on 13 December 2007 the respondent was detained under the Internal Security Act 1960 ('ISA'). The plaintiff commenced an action against the first defendant, the Inspector General of Police, the second defendant, the AG of Malaysia, and the third defendant, the Government of Malaysia, for damages in the tort of defamation. It was the plaintiff's case that the press statements made by the first and second defendants, which were later reported in the media on 7 December 2007 and 15 December 2007, were defamatory statements. The plaintiff averred that the words used in those statements, which were published in three newspapers, namely, *The Star*, the *New Straits Times* and the *Utusan Malaysia,* with a wide circulation nationwide, were understood to mean, inter alia, that the plaintiff as the prime mover of Hindraf was a terrorist who had links with terrorist organisations and local gangsters and that he intended to use violent means to overthrow the third defendant. The plaintiff pleaded that by reason of the publications he had been brought into public scandal and had suffered serious damages in Malaysia and throughout the world. The defendants averred that the alleged defamatory statements did not identify the plaintiff or refer to the plaintiff but only referred to the organisation Hindraf. The defendants applied under O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 to strike out the plaintiff's suit against them for defamation on the grounds that the alleged

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defamatory statements did not refer to the plaintiff but only to the organisation, Hindraf. The defendants submitted that the plaintiff's claim either disclosed no reasonable cause of action; or was scandalous, frivolous or vexatious; or was an abuse of the process of the court. This application to strike out the plaintiff's claim was dismissed by the judicial commissioner and hence this appeal.

Held, allowing the appeal with costs:

(1) (per **KN Segara JCA**) It was patently clear that the alleged defamatory statements neither referred to nor were directed against the plaintiff personally. Instead they referred to an illegal organisation known as Hindraf. As such, the statement of claim neither disclosed a reasonable cause of action nor an action that was obviously sustainable by the plaintiff in his private, personal and individual capacity (see para 1).

(2) (per **KN Segara JCA**) Hindraf was an illegal body, as it was not a registered society under the Societies Act 1966. As such, its leaders and members did not have the locus standi to institute any civil proceedings in a court of law. The plaintiff's defamation action, which was for all intents and purposes an action for and on behalf of Hindraf, was clearly unsustainable and bound to fail on the grounds of public policy as the court would not entertain any action by an illegal society and/or its leaders. Thus, this was a plain and obvious case that ought to be struck off under O 18 r 19 of the RHC (see paras 8–10).

(3) (per **Mohd Hishamudin JCA, dissenting**) The four newspaper reports, which were referred to as exhibits by the defendants do not support the defendants' contention that they were not referring to the plaintiff but the organisation, Hindraf. If the defamatory statements were read conjunctively and in their proper context it would be found that there was substance in the plaintiff's claim that the defendants' press statements did not only refer to Hindraf but that they also referred to the plaintiff. It was apparent that the plaintiff was obliquely referred to in the *New Straits Times* report of 7 December 2007 and specifically mentioned in the press report of 15 December 2007. Further, the first and second defendants who denied referring to the plaintiff in their press statements did not depose the affidavits supporting their striking out application. Instead the affidavits were deposed by a senior federal counsel ('the SFC') of the AG's chambers. As a principle of law the SFC, who was assuming the role of a solicitor for the defendants, could not affirm a contentious affidavit and the defendants should have deposed the affidavit themselves (see paras 34–38 & 57–58).

(4) (per **Mohd Hishamudin JCA, dissenting**) Although the defendants had pleaded qualified privilege, there were no affidavits deposed by them to explain how their press statements were protected by qualified privilege.

There was no authority or principle of law that a defamatory statement to the press by a government officer, ie the first and second defendants, was protected by qualified privilege (see paras 61–62).

[Bahasa Malaysia summary

Uthayakumar a/l Ponnusamy ('plaintif'), seorang peguambela dan peguamcara Mahkamah Tinggi Malaya, pada setiap masa matan merupakan penasihat perundangan Hindu Rights Action Force ('Hindraf'), sebuah organisasi yang memperjuangkan hak-hak kaum India yang diketepikan di Malaysia. Pada 25 November 2007, plaintif dan Hindraf telah mengadakan tunjuk perasaan besar-besaran di Kuala Lumpur untuk menunjukkan perasaan tidak puas hati mengenai layanan terhadap kaum India Malaysia oleh kerajaan Malaysia. Selanjutnya, pada 13 Disember 2007 responden telah ditahan di bawah Akta Keselamatan Dalam Negeri ('AKDN'). Plaintif telah memulakan tindakan terhadap defendan pertama, Ketua Polis Negara, defendan kedua, Peguam Negara Malaysia dan defendan ketiga, kerajaan Malaysia, untuk ganti rugi dalam tort fitnah. Adalah menjadi kes plaintif bahawa pernyataan akhbar yang dibuat oleh defendan pertama dan kedua, yang kemudiannya dilaporkan dalam media pada 7 Disember 2007 dan 15 Disember 2007, merupakan pernyataan-pernyataan fitnah. Plaintif menegaskan bahawa perkataan-perkataan yang digunakan di dalam pernyataan tersebut, yang mana diterbitkan di dalam tiga suratkhabar, iaitu, *The Star*, *New Straits Times* dan *Utusan Malaysia*, disebarkan seluruh negara, yang difahamkan bermaksud, antara lain, bahawa plaintif sebagai penggerak utama Hindraf merupakan pengganas yang mempunyai hubungan dengan pertubuhan pengganas dan gengster tempatan dan bahawa dia berniat untuk menggunakan cara yang ganas untuk menggulingkan defendan ketiga. Plaintif memplid bahawa disebabkan penerbitan tersebut dia telah berdepan dengan skandal umum dan telah mengalami kerosakan serius di Malaysia dan seluruh dunia. Defendan-defendan menegaskan bahawa pernyataan-pernyataan fitnah yang didakwa tidak mengenalpasti plaintif atau merujuk kepada plaintif tetapi hanya merujuk kepada organisasi Hindraf. Defendan-defendan memohon untuk A 18 k 19(1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan guaman plaintif terhadap mereka untuk fitnah atas alasan bahawa pernyataan-pernyataan fitnah yang didakwa tidak merujuk kepada plaintif tetapi hanya terhadap organisasi Hindraf. Defendan-defendan berhujah bahawa tuntutan plaintif tidak mengemukakan kausa tindakan; atau bersifat skandal, remeh atau menyusahkan; atau menyalahguna proses mahkamah. Permohonan untuk membatalkan tuntutan plaintif ditolak pesuruhjaya kehakiman dan justeru rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **KN Segara HMR**) Adalah sangat jelas bahawa pernyataan fitnah yang didakwa tidak merujuk atau ditujukan terhadap plaintif sendiri.

Sebaliknya, ia merujuk kepada organisasi haram yang dikenali sebagai Hindraf. Oleh itu, penyataan tuntutan tersebut tidak mengemukakan kausa yang munasabah atau tindakan yang dengan jelas boleh dikekalkan oleh plaintif dalam kapasiti peribadi atau secara individu (lihat perenggan 1).

(2) (oleh **KN Segara HMR**) Hindraf merupakan badan yang tidak sah, memandangkan ia bukanlah pertubuhan yang didaftarkan di bawah Akta Pertubuhan 1966. Oleh itu, pemimpin dan ahli-ahlinya tidak mempunyai locus standi untuk memulakan prosiding sivil dalam mahkamah perundangan. Tindakan fitnah plaintif, yang mana dalam segala niat dan tujuan suatu tindakan untuk dan bagi pihak Hindraf, dengan jelas tidak boleh dikekalkan dan berkemungkinan untuk gagal atas alasan polisi awam memandangkan mahkamah tidak akan melayan sebarang tindakan oleh penubuhan haram dan/atau pemimpinnya. Justeru, ini merupakan kes yang jelas dan nyata yang seharusnya dibatalkan di bawah A 18 k 9 KMT (lihat perenggan 8–10).

(3) (oleh **Mohd Hishamudin HMR, menentang**) Laporan keempat-empat suratkhabar, yang mana dirujuk sebagai ekshibit oleh defendan-defendan tidak menyokong hujahan defendan-defendan bahawa mereka tidak merujuk kepada plaintif tetapi organisasi Hindraf. Sekiranya pernyataan fitnah dibaca bersama dan dalam konteks yang wajar adalah didapati bahawa terdapat isi kandungan di dalam tuntutan plaintif bahawa pernyataan akhbar defendan-defendan bukan sahaja merujuk kepada Hindraf tetapi juga merujuk kepada plaintif. Adalah jelas bahawa plaintif secara tidak langsung dirujuk dalam laporan *News Straits Times* 7 Disember 2007 dan dengan spesifik disebut dalam laporan akhbar pada 15 Disember 2007. Selanjutnya, defendan pertama dan kedua yang menafikan merujuk kepada plaintif dalam pernyataan akhbar mereka tidak mendepos afidavit-afidavit yang menyokong permohonan pembatalan mereka. Sebaliknya afidavit-afidavit tersebut telah dideposkan oleh peguam kanan persekutuan ('PKP') dari kamar peguam negara. Sebagai prinsip undang-undang, PKP, yang mana menjalankan tugas sebagai peguambela untuk defendan-defendan, tidak boleh mengesahkan afidavit yang dipertikaikan dan defendan-defendan seharusnya mendepos afidavit-afidavit mereka sendiri (lihat perenggan 34–38 & 57–58).

(4) (oleh **Mohd Hishamudin HMR, menentang**) Meskipun defendan-defendan telah memplid perlindungan bersyarat, tidak terdapat sebarang afidavit yang didepos oleh mereka untuk menjelaskan bagaimana pernyataan akhbar mereka dilindungi oleh perlindungan bersyarat tersebut. Tidak terdapat apa-apa autoriti atau prinsip undang-undang bahawa pernyataan fitnah kepada akhbar oleh pegawai

kerajaan, iaitu defendan pertama dan kedua, adalah dilindungi oleh perlindungan bersyarat (lihat perenggan 61–62).]

Notes

For cases on striking out generally, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7425–7635.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 2 AMR 34, SC (refd)

Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58, HC (not folld)

Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2001] 1 MLJ 297; [2000] 4 CLJ 281, HC (refd)

Knupffer v London Express Newspaper, Limited [1944] AC 116, HL (distd)

Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315; [1985] 1 CLJ 181 (refd)

Nevill v Fine Arts and General Insurance Company, Limited [1897] 1 AC 68, CA (refd)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)

Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348; [1985] 2 CLJ 97 (refd)

Smith v Walker [1912] SC 224 (refd)

Legislation referred to

Internal Security Act 1960
Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(a), (b) or (d),
Societies Act 1966

Suzana bt Atan (Normastura bt Ayub with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
M Manoharan (M Manoharan & Co) for the respondent.

KN Segara JCA:

[1] This is an appeal on an O 18 r 19 of the Rules of the High Court 1980 application by the appellants (the defendants) to strike out the pleadings of the respondent (the plaintiff) for an action in libel which was dismissed by the learned judicial commissioner. By a majority, we allowed this appeal as the statement of claim discloses no reasonable cause of action and obviously unsustainable by the plaintiff in his private, personal and individual capacity, because it is patently clear from the alleged defamatory statement pleaded in paras 11, 15 and 17, that it does not refer to, or is directed against him personally, but to an illegal organisation known as HINDRAF.

[2] In paras 5, 6, and 20 of the statement of claim the plaintiff has described himself, his conduct and his association with HINDRAF, and pleaded as follows:

> 5. The plaintiff is an advocate and solicitor of the High Court of Malaya by profession and is a prominent human rights lawyer. The plaintiff is also legal advisor to the Hindu Rights Action Force (Hindraf), which is an organization that advocates the rights of marginalized Indians in Malaysia and campaigns against racial discrimination in Malaysia. The Plaintiff and Hindraf have at all times relied upon peaceful means to bring about change.
>
> 6. The plaintiff through Hindraf and the Police Watch and Human Rights Committee has campaigned for over 8 years against inter alia deaths in police custody, shooting to death of suspects by police and demolition of Hindu temples in Malaysia.
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> 20. At all material times, it was public knowledge both within and without Malaysia that the Plaintiff is legal adviser and prime mover of Hindraf.

[3] The first defendant was at all material times the Inspector General of Police, the second defendant the Attorney General of Malaysia and the third defendant the Government of Malaysia.

[4] A statement made on 6 December 2007 by the first defendant was published on 7 December 2007 in *The Star* and the *New Straits Times*. The alleged defamatory statement of the first defendant pleaded in para 11 of the statement of claim reads as follows:

> In the *Star* daily newspaper of 7 December 2007:
>
> There are signs lately that the Hindu Rights Action Force (Hindraf) is trying to garner support from terrorist groups, the police charged yesterday.
>
> In the *New Straits Times* daily newspaper of 7 December 2007 as follows:
>
> In a statement released by the Inspector General of Police Tan Sri Musa bin Hassan yesterday it was also revealed that the movement is seeking help from terrorists and local gangsters in achieving their goals.
>
> There have also been signs that the group has been actively canvassing for support and assistance from terrorist groups, he said.

[5] The plaintiff further alleged that the first defendant had further caused an alleged defamatory statement to be published in the *New Straits Times* daily newspaper of 15 December 2007 and pleaded the alleged defamatory statement in para 15 as follows:

> They clearly have links with international terrorist organizations and they are involved in activities that amount to inciting racial hatred.

[6] The plaintiff pleaded in para 17 of his statement of claim that the second defendant had caused to be written and published in the *Utusan Malaysia* daily newspaper of 8 December 2007 alleged defamatory statements as follows:

> SHAH ALAM 7 DIS — Terdapat laporan polis yang dibuat oleh orang awam mengatakan Hindu Rights Action Force (Hindraf) memang mempunyai hubungkait dengan puak pelampau pemberontak Harimau Pembebasan Tamil Eelam (LTTE).
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> Peguam Negara, Tan Sri Abdul Gani Patail berkata, sekiranya tiada bukti dan perkara itu tidak benar nescaya beliau tidak akan menyebutnya di mahkamah terbuka baru-baru ini.

[7] The alleged defamatory statements referred to above did not identify the plaintiff or refer to the plaintiff. In essence, the alleged defamatory statements were directed at an organization called HINDRAF.

[8] HINDRAF is not a registered society under the Societies Act 1966. HINDRAF is an illegal body. Its leaders and members have neither the locus standi nor the legal right to institute any civil proceedings in a court of law.

[9] The plaintiff's defamation action is for all intents and purposes an action for and on behalf of HINDRAF. The defamation action is clearly unsustainable and bound to fail on the grounds of public policy as the court would not entertain any action by an illegal society and/ or its leaders and/or its prime mover.

[10] This is a plain and obvious case that ought to be struck off under O 18 r 19 of the Rules of the High Court 1980. Appeal allowed with costs fixed at RM20,000.

[11] My brother, Abdul Aziz Abd Rahim, has read this judgment in draft and concurs with it.

Mohd Hishamudin JCA (dissenting):

[12] This is an appeal against the decision of the learned judge of the High Court of Kuala Lumpur who had dismissed the appellants' application under O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 to strike out the respondent's suit against them for defamation.

[13] I am dismissing the appeal with costs.

[14] The respondent is an advocate and solicitor of the High Court of

Malaya. He is the legal advisor to an organisation called the 'Hindu Rights Action Force' or 'Hindraf', an organisation that advocates the rights of marginalised Indians in Malaysia and campaigns against racial discrimination in this country.

[15] The first appellant, Tan Sri Musa Hassan, was the Inspector General of Police ('the IGP'), Malaysia, at the material time.

[16] The second appellant, Tan Sri Abdul Gani Patail, is the Attorney General of Malaysia ('the AG').

[17] On 25 November 2007 the respondent and Hindraf organised a massive street rally in Kuala Lumpur to express discontent as to the treatment of Malaysian Indians by the Government of Malaysia.

[18] On 13 December 2007 the respondent was detained under the Internal Security Act 1960 ('ISA').

[19] The first and second appellant had made statements to the press, and these press statements were reported in the media as follows:

(a) reported in *The Star* on 7 December 2007 (press statement of Tan Sri Musa Hassan);

(b) reported in the *New Straits Times* on 7 December 2007 (press statement of Tan Sri Musa Hassan);

(c) reported in the *Utusan Malaysia* on 8 December 2007 (press statement of Tan Sri Abdul Gani Patail on 7 December 2007); and

(d) reported in the *New Straits Times* on 15 December 2007 (press statement of Tan Sri Musa Hassan).

[20] At the High Court the respondent had filed an action for defamation against the appellants claiming that the above press statements had defamed him in that the statements had alleged that he and the leaders of Hindraf had links with terrorist organisations and local gangsters and were involved in activities that incite racial hatred.

[21] The respondent's writ was filed on 4 January 2008.

[22] The appellants' joint statement of defence was filed on 5 June 2008.

[23] The appellants' striking out application (by summons in chambers) was

filed on 11 June 2008. The application was supported by three supporting affidavits namely:

(a) an affidavit by Dato' Kamaludin bin Md Said, senior federal counsel, attorney general's chambers, affirmed on 10 June 2008;

(b) an affidavit by Puan Kalsom bt Abdul Aziz, Crime Investigation Officer, Police Headquarters, Dang Wangi, Kuala Lumpur, affirmed on 9 June 2008; and

(c) an affidavit by Puan Kalsom bt Abdul Aziz, Crime Investigation Officer, Police Headquarters, Dang Wangi, Kuala Lumpur, affirmed on 3 March 2009.

[24] The respondent, Mr Uthayakumar, in opposing the application, filed only one affidavit, namely, an affidavit affirmed by him on 18 December 2008.

[25] The appellants' striking out application was on the grounds that the respondent statement of claim discloses no reasonable cause of action (ie limb (a) of subrule (1)); or, alternatively, that it is scandalous, frivolous or vexatious (ie limb (b) of subrule (1)); or, alternatively, that it is otherwise an abuse of the process of the court (ie limb (d) of subrule (1)).

[26] In this judgment, for convenience, I shall be referring to the appellants as 'the defendants' (or as 'the first defendant' or 'the second defendant', as the case may be), and to the respondent as 'the plaintiff.

[27] As said earlier, at the High Court, the plaintiff's claim against the defendants is for damages for the tort of defamation; and that the claim arises out of certain statements made by the first and second defendants to the media on 7 December 2007 and 15 December 2007 namely, to the *New Straits Times*, *The Star* and the *Utusan Malaysia*.

[28] It is averred in para 11 of the statement of claim that the first defendant (Tan Sri Musa Hassan, the Inspector General of Police) had told *The Star* newspaper and reported on 7 December 2007 that:

> There are signs lately that the Hindu Rights Action Force (Hindraf) is trying to gamer support from terrorist groups, the police charged yesterday.

[29] It is also averred in the same paragraph of the statement of claim that the first defendant had told the *New Straits Times* on 7 December 2007:

> ln a statement released by Inspector General of Police Tan Sri Musa bin Hassan yesterday it was also revealed that the movement is seeking help from terrorists and local gangsters in achieving their goals.

There have also been signs that the group has been actively canvassing for support and assistance from terrorist groups, he said.

[30] In para 15 of the statement of claim it is further alleged that the first defendant had told the *New Straits Times* on 15 December 2007 that:

They clearly have links with international terrorist organizations and they are involved in activities that amount to inciting racial hatred.

[31] The first ground on which the defendants apply to strike out the statement of claim is that the statements by the defendants to the press on the various dates mentioned do not refer to the plaintiff, Mr Uthayakumar. They only refer to the organisation, 'Hindraf'.

[32] Thus the issue here is whether their press statements refer to Mr Uthayakumar, or whether they only refer to Hindraf. Or, at the very least, whether the question as to whether or not their press statements refer to Hindraf as well as to the plaintiff, is an issue that deserves to be tried.

[33] I shall begin by referring to the statement of claim of the plaintiff. It reads:

(1) The plaintiff is an individual having an address at Tempat Tahanan Perlindungan Kamunting, 34009 Taiping, Kamunting, Perak Darul Ridzuan.

(2) The 1st defendant is the Inspector General of Police of Malaysia having an address at Ibu Pejabat Polis Diraja Malaysia, Bukit Aman, 50560 Kuala Lumpur.

(3) The 2nd defendant is the Attorney General of Malaysia having an address at Jabatan Peguam Negara, Aras 1-8, Block C3, Pusat Pentadbiran Kerajaan Persekutuan, 62512 Wilayah Persekutuan, Putrajaya.

(4) The 3rd defendant is the Government of Malaysia and was at all material times, the employer and/or principal of the 1st and 2nd defendants. The 3rd defendant's address for service is at Jabatan Peguam Negara, Aras 1-8, Block C3, Pusat Pentadbiran Kerajaan Persekutuan, 62512 Wilayah Persekutuan, Putrajaya.

(5) The plaintiff is an advocate and solicitor of the High Court of Malaya by profession and is a prominent human rights lawyer. The plaintiff is also legal advisor to the Hindu Rights Action Force (Hindraf), which is an organization that advocates the rights of marginalized Indians in Malaysia and campaigns against racial discrimination in Malaysia. The plaintiff and Hindraf have at all times relied upon peaceful means to bring about change.

(6) The plaintiff through Hindraf and the Police Watch and Human Rights Committee has campaigned for over 8 years against inter alia deaths in police custody, shooting to death of suspects by police and demolition of Hindu temples in Malaysia.

(7) In the course of the above said campaign, the plaintiff has in carrying out his duties been critical of the 1st defendant and Malaysian Police force, the office of the 2nd defendant and 3rd defendant.

(8) On 25.11.2007 massive discontent of marginalized Indians over their ill treatment by the 3rd defendant resulted in a peaceful gathering of about 50,000 Malaysian Indians in the Federal Capital of Kuala Lumpur. The said peaceful gathering was organized by the plaintiff and Hindraf.

(9) The plaintiff states and will state that the massive demonstration of Indian discontent on 25.11.2007 made the 3rd defendant fearful of loosing the support of Malaysians of Indian origin and of the political consequences arising therefrom for the ruling National Front Government.

(10) Subsequent to the peaceful gathering of 25.11.2007, top Government leaders including the Prime Minister and his Deputy began a campaign of vilification and demonization of the plaintiff and Hindraf, evidence of which will be adduced at the trial of this action.

(11) In line with the stance of the 3rd defendant, the 1st defendant falsely and maliciously caused to be written and published of the plaintiff and Hindraf as follows:—

(i) In the Star daily newspaper of 7.12.2007 as follows:— 'There are signs lately that the Hindu Rights Action Force Hindraf) is trying to garner support from terrorist groups, the police charged yesterday'.

(ii) In the News Straits Times daily newspaper of 7.12.2007 as follows:—

In a statement released by Inspector General of Police Tan Sri Musa bin Hassan yesterday it was also revealed that the movement is seeking help from terrorists and local gangsters in achieving their goals.

There have also been signs that the group has been actively canvassing for support and assistance from terrorist groups, he said.

(12) The above two daily newspapers have a wide circulation nationwide. The said statement of the 1st defendant was also widely published in Bahasa Malaysia daily newspapers, the vernacular press and the electronic media, evidence of which will be adduced at the trial of this action.

(13) Due to the intense international interest in the peaceful struggle of the plaintiff and Hindraf, the said statement of the 1st defendant was also widely disseminated globally in both print and electronic form, evidence of which will be adduced at the trial of this action.

(14) On 13.12.2007, the plaintiff was detained without trial under the Internal Security Act 1960 pursuant to representations made by the 1st defendant to the Prime Minister of Malaysia who is also Intemai Security Minister. The plaintiff states that his detention is unlawful and politically motivated and is currently challenging the Order of Detention by way of habeas corpus proceedings.

(15) Subsequent to the detention of the plaintiff which was perpetrated by the 1st and

3rd defendants, the 1st defendant again false and maliciously caused to be written and published of the plaintiff in the New Straits Times daily newspaper of 15.12.2007 as follows:—

> They clearly have links with international terrorist organizations and they are involved in activities that amount to inciting racial hatred.

(16) The above statement was also widely disseminated in both print and electronic media locally and internationally, evidence of which will be adduced at the trial of this action.

(17) The 2nd defendant falsely and maliciously caused to be written and published of the plaintiff in the Utusan Malaysia daily newspaper of 8.12.2007 as follows:—

> SHAH ALAM 7 Dis. — Terdapat laporan polis yang dibuat oleh orang awam mengatakan Hindu Rights Action Force (Hindraf) memang mempunyai hubungkait dengan puak pelampau pemberontak Harimau Pembebasan Tamil Eelam (LTTE).
>
> Peguam Negara, Tan Sri Abdul Gani Patail berkata, sekiranya tiada bukti dan perkara itu tidak benar nescaya beliau tidak akan menyebutnya di Mahkamah Terbuka baru-baru ini.

(18) The said Utusan Malaysia daily newspaper has a wide circulation nationwide. The said statement was also published widely in the print and electronic media locally and internationally, evidence of which will be adduced at the trial of this action.

(19) The plaintiff states that the allegations that the plaintiff has terrorist links were fabricated and politically motivated. The plaintiff states that the said allegations were made for the first time by the defendants more than 10 days after the massive peaceful gathering of November 25 and were clearly an attempt to destroy the credibility and reputation of the plaintiff and Hindraf who now had mass popular support among the people.

(20) At all material times, it was public knowledge both within and without Malaysia that the plaintiff is legal adviser and prime mover of Hindraf.

(21) The said words in their literal and ordinary meaning meant and were understood to mean that:—

(i) That the plaintiff was a terrorist;

(ii) That the plaintiff was an evil human being;

(iii) That the plaintiff intended to use violent means to achieve his objectives;

(iv) That the plaintiff intended to kill or maim other Malaysians;

(v) That the plaintiff was an immoral person;

(vi) That the plaintiff was not a law-abiding citizen;

(vii) That the plaintiff used and I or intended to use violent means to overthrow the 3rd defendant.

(22) By reason of the publication of the said words the plaintiff has been brought into public scandal, odium and contempt and has suffered serious damage, both in Malaysia and throughout the world.

[34] I shall now refer *in full* to the press reports as referred to in the statement of claim. *The Star* online report reads:

the star

online

Friday December 7, 2007

IGP: Hindraf trying to garner support from terrorist groups

By LOURDES CHARLES and ANDREW SAGAYAM

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newsdesk@.thestar.com.my

KUALA LUMPUR: There are signs lately that the Hindu Rights Action Force (Hindraf) is trying to garner support from terrorist groups, the police charged yesterday.

Inspector-General of Police Tan Sri Musa Hassan said Hindraf has also set up a fund by misleading the public into believing that the money is to finance its activities.

'We view such matters very seriously. It is also very worrying especially when we live in a multi-racial society.

'The police will not hesitate to take stem action against anyone to ensure that peace and security prevails in this country,' he said.

Musa also said the group was trying to sow hatred towards the Government and that its actions could spark racial clashes.

He said such dangerous sentiments were being widely spread via Hindraf forums, distribution of books and leaflets, on websites as well as service.

'It is also trying to rope in gangsters to prevent local authorities from demolishing illegal temples in the near future.

'The fanning of such racial sentiments among the Indians is very unhealthy and dangerous,' Musa said, adding that the police would not hesitate to invoke the Internal Security Act (ISA) against those who abused technology to stoke racial hatred or unrest.

One of Hindraf's leaders, P. Uthayakumar, was reported as saying in an interview in Monday's edition of Singapore' New Paper that that he would not rule out using violence.

He was quoted as saying that the protest by monks in Myanmar last September inspired Hindrafs public protest.

'The monks were prepared to die for their cause. I've shown slides of monks getting shot and killed during my road shows and I think it struck a chord with the people.

'I think it's quite unlikely we'll head down that path towards a civil war but there's always that possibility. Some of the uneducated may resort to violence,' Uthayakumar was quoted as saying by the paper.

He also allegedly made similar statements in an interview with Indian national television in a programme called Times Now, where he warned of serious consequences.

[35] The *New Straits Times* report of 7 December 2007 reads:

IGP: Hindraf out to incite racial unrest

KUALA LUMPUR: The Hindu Rights Action Force's (Hindraf) actions are aimed at stoking hatred against the government and inciting racial unrest in the country.

This was discovered following intense police investigations in the past six months into the unregistered movement's activities.

In a statement released by Inspector-General of Police Tan Sri Musa Hassan yesterday, it was also revealed that the movement is seeking help from terrorists and local gangsters in achieving their goals.

'There have also been signs that the group has been actively canvassing for support and assistance from terrorist groups,' he said.

'They are also lobbying for international support from India, the United Kingdom, the United States, the United Nations and Europe.

'They have given a twisted and distorted picture to the international community on the status of Indians in Malaysia.

A Hindraf email sent to British Prime Minister Gordon Brown mentioned 'ethnic cleansing' of Indians in Malaysia by an Islamic extremist government. The government has also been accused of sidelining and denying the rights of the Indian community in the economic, education and public sectors.

This has allegedly resulted in the Indian community going backward despite the country celebrating its 50th year of independence.

In describing the allegations as false, baseless and slanderous in nature, Musa said these sentiments have also been spread through forums, books, leaflets, websites and text messages locally.

'They have been actively sowing racial sentiments among the Indians in the country with the aim of inciting hatred and uprising against the government.'

Intelligence also revealed that Hindraf had duped their supporters into raising funds for their cause.

'Hindraf has been monitored by police since July 28. It is an unregistered organization which was founded by five lawyers and a senior executive from a private firm,' Musa said.

The group is also believed to have been behind violent protests against the local authorities who attempted to demolish temples that had been built illegally.

Those involved in the protests claimed that the destruction of the holy shrines was simply another act by the government of clamping down on freedom of religion in Malaysia.

Investigations have also revealed that the involvement of secret society members to prevent the demolition of shrines and temples in the future.

Hindraf also displayed its stubborn side by insisting on organizing an illegal gathering on Nov 25 despite not having a permit to do so.

It allegedly also lied to the Indians who attended the gathering by not handing over a petition to the British High Commission despite having ample opportunity to do so.

'This shows their real intention of causing chaos and mayhem in the capital. They also twisted and distorted the entire incident by accusing police of using excessive force on the demonstrators,' Musa said.

'This situation is very worrying as Malaysia is a multi-racial society and police are not taking this matter lightly. The authorities will not hesitate to take action to protect public order and security in the country.

Musa advised the public not to be influenced by baseless allegations and rumours spread by irresponsible parties through the Internet and text messages as it can cause anxiety and worsen the situation.

Those caught for spreading these text messages or false news can be arrested under Section 28 of the Internal Security Act 1960. If found guilty, they can be fined up to RM10,000 or jailed for three years or both.

Meanwhile, Hindraf founder leader P. Waytha Moorthy warned that Malaysia could become another Sri Lanka, which has been wracked by violence for several decades due to clashes between the government and the Liberation Tigers of Tamil Eelam.

Waytha Moorthy was interviewed by Indian newspaper, the Indian Express, which published the report last Saturday. He has been traveling abroad extensively to lobby for support from non-government organizations and politicians.

Waytha Moorthy's brother. P. Uthayakumar told The New Paper in Singapore that violence was a possibility that the Indian community would consider in order to push their agenda.

That report appeared on the front page of the New Paper on Dec 4.

[36] The full press report in the *Utusan Malaysia* of the attorney general, Tan Sri Gani Patail (reported on 7 December) is as follows:

Utusan Online

BERITA UTAMA

ARKIB: 08/12/2007

Ada laporan polis kaitkan Hindraf dengan LTTE

A SHAH ALAM 7 Dis. — Terdapat laporan polis yang dibuat oleh orang awam mengatakan Hindu Rights Action Force (Hindraf) memang mempunyai hubung kait dengan puak pelampau pemberontak Harimau Pembebasan Tamil Eelam (LTTE).

B Peguam Negara, Tan Sri Abdul Gani Patail berkata, sekiranya tiada bukti dan perkara itu tidak benar nescaya beliau tidak akan menyebutnya di Mahkamah Terbuka baru-baru ini.

'Kita tidak boleh menyokong atau mempunyai urusan kewangan dengan organisasi seperti itu kerana ia akan memberikan implikasi yang serius.

C 'Namun, saya percaya siasatan lanjut sedang dijalankan berhubung laporan polis tersebut.' Katanya.

Ditanya sama ada mereka yang dinamakan dalam laporan polis itu akan didakwa dalam waktu yang terdekat. Abdul Gani menjawab, pendakwaan tidak akan dibuat dengan sewenang-wenangnya.

D 'Ini bukannya perkara main-main. Sebab itu, saya menyebut perkara ini di dalam Mahkamah. Memang ada laporan polis sebab itulah saya memandang serius perkara ini.

E 'Seluruh dunia juga risau jika mereka mempunyai hubungan dengan LTTE,' kata Abdul Gani kepada pembehta sejurus Mahkamah Tinggi di sini petang ini membenarkan permohonan peguam penyokong Hindraf supaya prosiding semakan yang difailkan ditangguhkan sehingga Isnin ini.

Peguam Negara menyatakan demikian ketika diminta mengulas kenyataan beliau yang berhujah di hadapan Hakim Mahkamah Sesyen di sini kelmarin bagi

F membantah 31 penyokong Hindraf dibebaskan dengan ikatjamin.

Dalam pada itu, peguam P. Uthayakumar yang mewakili penyokong Hindraf mencabar Abdul Gani, Ketua Polis Negara dan Perdana Menteri mengemukakan bukti bahawa Hindraf mempunyai kaitan dengan LTTE.

G Uthayakumar juga menjemput mereka mengadakan sidang akhbar bersama Hindraf bagi membolehkan mereka mengemukakan bukti.

Sementara itu, peguam M. Manoharan hari ini memfailkan semakan di tiga buah Mahkamah berasingan setelah tidak berpuas hati dengan keputusan-keputusan yang dibuat ke atas 96 penyokong Hindraf yang didakwa terlibat dalam

H perhimpunan haram di sekitar ibu Negara 25 November lalu.

Beliau ketika dihubungi memberitahu permohonan semakan jenayah berhubung keputusan Hakim Mahkamah Sesyen, Azimah Omar telah difailkan di Mahkamah Tinggi di sini hari ini.

I Turut difailkan ialah semakan berhubung keputusan Majistret Sesyen Selayang dan Mahkamah Majistret Kuala Lumpur yang menolak bantahan awal peguam-peguam berhubung pertuduhan yang didakwa tidak lengkap dan cacat.

[37] The *New Straits Times* report of 15 December 2007 reads:

IGP says detention of Hindraf leaders under ISA necessary

KUALA LUMPUR: The detention of the five Hindu Rights Action Force (Hindraf) leaders under the Internal Security Act on Thursday was imperative.

Inspector-General of Police Tan Sri Musa Hassan said investigations into the movement's activities since July had deemed the five to be a threat to national security.

'They clearly have links with International terrorist organizations and they are involved in activities that amount to inciting racial hatred.'

He said the evidence against them and the proposal to detain them under the ISA were forwarded to Prime Minister Datuk Seri Abdullah Ahmad Badawi, who is also internal security minister.

Musa was commenting on the arrest of lawyers P. Uthayakumar, R. Kengadharan, V. Ganabatirau, M. Manoharan and a senior executive with Malaysia Building Society Bhd, K. Vasantha Kumar.

The four lawyers were legal advisers for Hindraf while Vasantha Kumar was the movement's co-ordinator. All were sent to the Kamunting detention centre in Taiping, Perak, for two years under Section 8(1) of the Internal Security Act 1960.

The five were key officials of Hindraf, which organized a rally here on Nov 25 where some 10,000 Indians protested against alleged racial discrimination.

Musa also said the five were also trying to sow hatred towards the government, adding that their actions could spark racial clashes. He said inflammatory sentiments were being widely spread through their forums, distribution of books and leaflets, on websites as well as through the short messaging service.

'The fanning of racial sentiments among Indians is very unhealthy and dangerous.'

When asked whether the ISA would be used on Uthayakumar's brother, P. Waytha Moorthy, who is currently overseas garnen'ng support for Hindraf, Musa did not rule out that possibility.

'We cannot arrest him now as he is overseas.'

Waytha Moorthy was also charged with sedition last month, but was released on bail.

He is believed to have then gone to India to garner support there. Currently he is said to be in the United Kingdom.

He urged Hindraf leaders and supporters not to continue going against the government and the law.

Musa also did not rule out the possibility that more Hindraf leaders and supporters would be arrested under the ISA.

'We would not hesitate to take similar action against them.' He also pointed out that Hindraf was not a legal organization.

[38] In my judgment, the above press statements of the IGP and the AG, if

one were to read them conjunctively and in their proper contexts, and bearing in mind that the plaintiff is an advocate and solicitor, the legal advisor to Hindraf and a prime mover of the organisation, and being one of those detained under the ISA on 13 December 2007, one will appreciate that, not only do the statements refer to Hindraf, they also do refer to the plaintiff and some other individuals as well. Each press statement cannot be looked at in isolation. They are part of a series of press reports made one after another within a short duration of time on the same subject matter — on Hindraf and its leaders and on their activities; and on the plaintiff who is one of the leaders of Hindraf.

[39] It is to be recalled that, in his *New Straits Times* press statement of 7 December 2007, the Inspector General of Police had said:

> Hindraf has been monitored by police since July 28. It is an unregistered organization which was founded by five lawyers and a senior executive from a private firm, Musa said.

[40] Now, who are these 'five lawyers and a senior executive from a private firm?' Bearing in mind that Mr Uthayakumar is an advocate and solicitor, has pleaded that he is a legal advisor of Hindraf and a prime mover of the said organisation (see para 20 of the statement of claim), and was one of the leaders of Hindraf who was subsequently detained under the ISA, to my mind the inference that can fairly be made is that Mr Uthayakumar was one of the 'five lawyers' mentioned by the IGP; or, at the very least, the issue as to whether or not the plaintiff was meant to be one of the 'five lawyers' is a triable one and should not be summarily dismissed as being devoid of merit. It is, however, true that the fact that the IGP was referring to Mr Uthayakumar as being one of the 'five lawyers' was not that clear then because the IGP in the press statement of 7 December did not mention the names of the five lawyers. But the fact that Tan Sri Musa Hassan was referring to Mr Uthayakumar and the five others became clear when Tan Sri Musa Hassan gave the subsequent *New Straits Times* press statement of 15 December 2007, that is to say eight days later, when he was reported to have said:

> Musa was commenting on the arrest of lawyers P Uthayakumar, ft Kengadharan, V Ganabatirau, M Manoharan and a senior executive with Malaysia Building Society Bhd, K Vasantha Kumar.

[41] And that brings me to the press report of 15 December 2007. Now, of the four above mentioned press reports, the report of the *New Straits Times* of 15 December is a clear evidence that the first defendant's (Tan Sri Musa Hassan/IGP) allegations about the plaintiff being involved in terrorist organisations and acts of terrorism and inciting racial hatred were, not only

directed at the organisation, Hindraf, but were also leveled at Mr Uthayakumar, the plaintiff, and five others (including four lawyers). A

[42] In the press statement of 15 December 2007, Tan Sri Musa Hassan said:

> The detention of the five Hindu Rights Action Force (Hindraf) leaders under the Internal Security Act on Thursday was imperative. B
>
> ...
>
> They clearly have links with International terrorist organizations and they are involved in activities that amount to inciting racial hatred. C

[43] Now, in the context of the above press statement, the pertinent question to ask is: who was Tan Sri Musa Hassan referring to when he mentioned:

> five Hindu Rights Action Force (Hindraf) leaders D

and when he used the pronoun 'They' or 'they' in his press statement. There is no doubt that by 'five Hindu Rights Action Force (Hindraf) leaders' and by using the pronoun 'They' or 'they' Tan Sri Musa Hassan had meant Mr Uthayakumar and four others namely: E

(a) lawyer, Mr Kengadharan;

(b) lawyer, Mr Ganabatirau;

(c) lawyer, Mr Manoharan; and

(d) senior executive, Mr Vasantha. F

[44] That this is so is made very clear by that part of the same report that states:

G

> Musa was commenting on the arrest of lawyers P. Uthayakumar, R. Kengadharan, V. Ganabatirau, M. Manoharan and a senior executive with Malaysia Building Society Bhd, K. Vasantha Kumar.
>
> ...
>
> Musa also said the five were also trying to sow hatred towards the government, adding that their actions could spark racial clashes. H

[45] I now move on to the second defendant, Tan Sri Gani Patail, the attorney general. I

[46] It is to be recalled that I have, above, set out in full the *Utusan Malaysia* press report that contains his 7 December press statement (reported in the *Utusan Malaysia* on 8 December 2007).

[47] The second defendant, like the first defendant, also denies that he was referring to the plaintiff in the above press statement. He contends that he was merely referring to an organisation called Hindraf. In my judgment, whilst it is true that Mr Uthayakumar's name is not specifically mentioned in the above press report, nevertheless, the issue whether or not Tan Sri Gani Patail was also referring to the plaintiff (besides Hindraf) in the above press statement should also be a matter that should be resolved by means of a trial. I am unable to convince myself that Tan Sri Gani's contention (that he was not referring to the plaintiff at all) must be accepted without there being any necessity at all for a trial. I ask myself: from the pleadings and the affidavit evidence, can it be fairly concluded that the plaintiff's claim, that Tan Sri Gani Patail in his press statement was not only referring to Hindraf but was also referring to the plaintiff, is a claim that is *obviously unsustainable* (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 2 AMR 34)? In my judgment the answer surely must be in the negative. I so hold for the following reasons. Firstly, it is not disputed that Mr Uthayakumar is an advocate and solicitor, and has pleaded that he is the legal advisor to Hindraf and a prime mover of that organisation, and was arrested under the ISA on 13 December 2007. In this regard, the learned High Court judge, in her grounds of judgment, has rightly observed:

> On its own Hindraf cannot operate without individuals manning it. The activities of Hindraf can only be carried out by individuals.

[48] Secondly, in the above press statement, Tan Sri Gani Patail had made reference to a police report. Mr Uthayakumar, in para 14 of his affidavit in reply, alleges that the police report referred to by Tan Sri Gani Patail had named him and some others. It is to be recalled that the press report states:

> Terdapat laporan polis yang dibuat oleh orang awam mengatakan Hindu Rights Action Force (Hindraf) memang mempunyai hubung kait dengan puak pelampau pemberontak Harimau Pembebasan Tamil Eelam (LTTE).
>
> Peguam Negara, Tan Sri Abdul Gani Patail berkata, sekiranya tiada bukti dan perkara itu tidak benar nescaya beliau tidak akan menyebutnya di Mahkamah Terbuka baru-baru ini.
>
> 'Kita tidak boleh menyokong atau mempunyai urusan kewangan dengan organisasi seperti itu kerana la akan memberikan implikasi yang serius.
>
> 'Namun, saya percaya siasatan lanjut sedang dijalankan berhubung laporan polis tersebut.' Katanya.
>
> Ditanya sama ada mereka yang dinamakan dalam laporan polis itu akan didakwa dalam waktu yang terdekat. Abdul Gani menjawab, pendakwaan tidak akan dibuat dengan sewenang-wenangnya.
>
> 'Ini bukannya perkara main-main. Sebab itu, saya menyebut perkara ini di dalam Mahkamah. Memang ada laporan polis sebab itulah saya memandang serius perkara ini.

'Seluruh dunia juga risau jika mereka mempunyai hubungan dengan LTTE,' kata Abdul Gani kepada pemberita sejurus Mahkamah Tinggi di sini petang ini membenarkan permohonan peguam penyokong Hindraf supaya prosiding semakan yang difailkan ditangguhkan sehingga Isnin ini.

Peguam Negara menyatakan demikian ketika diminta mengulas kenyataan beliau yang berhujah di hadapan Hakim Mahkamah Sesyen di sini kelmarin bagi membantah 31 penyokong Hindraf dibebaskan dengan ikat jamin.

[49] Significantly, the plaintiff's averment that he is one of those named in the police report is not rebutted by Tan Sri Gani Patail.

[50] Thirdly, the application to strike out the statement of claim is that of the second defendant (jointly with the first defendant). Thus, the legal burden is on the second defendant to show to the court that the plaintiff's suit is frivolous and vexatious or an abuse of the court process. This can easily be done by exhibiting the police report showing that Mr Uthayakumar is *not* one of those named in the police report. But the second defendant chose not to do so. In fact the second defendant chose not to depose any affidavit at all. Indeed, he had some other person (namely, senior federal counsel, Dato Kamaludin) to depose an affidavit to state on his behalf that he was not referring to the plaintiff at all.

[51] Fourthly, the matter must also be judged in the following context. Tan Sri Gani, being the attorney general, had to cooperate and work closely with Tan Sri Musa Hassan, the IGP, on the Hindraf matter. The investigation and arrest of persons in the Hindraf matter were carried out by the police, that is to say, officers under the command of the IGP; whilst legal advice and prosecution are within the domain of the attorney general. Obviously the IGP and the AG cooperated, consulted and shared information with one another. Thus what Tan Sri Gani Patail said to *Utusan Malaysia* on the 7 December and what Tan Sri Musa Hassan said to the *New Straits Times* and *The Star* on 7 and 15 December cannot be look at in isolation. The information released by these two high officials of the government to the press were closely interrelated or interconnected and must be looked at and judged in conjunction with one another. Now, if Tan Sri Musa Hassan, in his press statements (and, particularly, the 15 December press statement), was clearly referring to Mr Uthayakumar and some other individuals that he had named therein, is it not plausible to argue then that Tan Sri Gani Patail in his press statement, in referring to Hindraf, was also referring to the plaintiff and the same individuals?

[52] The four newspaper reports which I have referred to in this judgment were tendered as exhibits (exh KMS1, exh KMS2, exh KMS3 and exh KMS4) by senior federal counsel, Dato Kamaludin in his first affidavit affirmed on 10 June 2008. The purpose of tendering the newspaper reports in full is to show to

A the court that the defendants in their press statements were merely referring to Hindraf, the organisation, and not at all to the plaintiff. In para 7 of his affidavit, Dato' Kamaludin avers:

> 7 Kesemua keratan surat khabar yang disebutkan di atas dengan jelasnya tidak merujuk kepada Plaintif tetapi merujuk kepada HINDRAF.

B

[53] However, in my judgment, the reports do not appear to support the defendants' contention. On the contrary, the full press reports only go to show that there is substance in the plaintiff's claim that the defendants' press statements, as pleaded to in the statement of claim, not only refer to Hindraf but they also do refer to the plaintiff.

C

[54] In *Nevill v Fine Arts and General Insurance Company, Limited* [1897] 1 AC 68 Lord Halsbury LC said (at p 72):

D

> It is necessary to take into consideration, not only the actual words used, but the context of the words.

E **[55]** In *Smith v Walker* [1912] SC 224 Lord Kinnear said (at p 228):

> Words in themselves apparently innocent may be shown to have a defamatory meaning when they are read with reference to the circumstances in which they were uttered or written, and with reference to the context in which they appear.

F

[56] On the basis of these principles, the plaintiff should be given an opportunity to have his day in court and that his claim ought not to be summarily dismissed without a trial.

G **[57]** The House of Lords case of *Knupffer v London Express Newspaper, Limited* [1944] AC 116, referred to by the defendants, can be distinguished. Firstly, *Knupffer* is not a case of striking out. In that case the trial court made a finding, after a full trial, that the defamatory words published in newspaper refer to the plaintiff. That decision was subsequently reversed by the Court of
H Appeal, and, on appeal, the House of Lords upheld the decision of the Court of Appeal. Secondly, in *Knupffer* the words published never mentioned at all the plaintiff's name, whereas in the present case the plaintiff was obliquely referred to in the *New Straits Times* report of 7 December 2007 and was specifically mentioned in the press report of 15 December 2007.

I

[58] There is another point taken up by learned counsel for the respondent/plaintiff, Encik Manoharan, in his submission. Learned counsel pointed out that the supporting affidavit of the defendants' striking out application was deposed by Dato' Kamaludin bin Mohd Said, a senior federal

counsel of the attorney general's chambers (I am putting aside Puan Kalsom's affidavits for the moment, as her affidavits are not relevant for this issue). The affidavit was not deposed either by Tan Sri Musa Hassan or by Tan Sri Gani Patail. Now, the defendants, in their joint statement of defence, deny that the press statements refer to Mr Uthayakumar. Their position is that they were merely referring to an organisation called Hindraf; and that they were not referring to the plaintiff at all. In my judgment, the persons who ought to make the denial should have been Tan Sri Musa Hassan and Tan Sri Gani Patail themselves. The defendants should have deposed the affidavit; and not Dato' Kamaludin Said. Dato' Kamaludin's affidavit is contentious. It is the principle that a solicitor cannot affirm a contentious affidavit. It is the litigant himself who must affirm the affidavit (see *Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2001] 1 MLJ 297; [2000] 4 CLJ 281; *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315; [1985] 1 CLJ 181; and *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348; [1985] 2 CLJ 97). Since Dato' Kamaludin is a senior federal counsel the same principle would apply; for he was assuming, here, a role similar to that of a solicitor for the defendants.

[59] In their defence, the defendants have also pleaded qualified privilege. For the purpose of this appeal, both the defendants have raised the issue of qualified privilege in their memorandum of appeal. However, I do note that in the appellants' written submission before this court the argument of qualified privilege appears to be advanced only in respect of the first defendant, Tan Sri Musa Hassan.

[60] For the defence of qualified privilege to succeed, the defendants have to allude to facts to show that the defendants were under a moral, social or legal duty to communicate the defamatory matter to the recipient. There is also the requirement that the recipient must be under a duty or to have an interest in receiving the publication. In *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 Wan Hamzah SCJ in delivering the judgment of the Supreme Court states the principle as follows (at p 178):

> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, makes statements about another which are defamatory and in fact untrue: *Watt v Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v Bush* [1885] 5 E & B 344. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential: *Adam v Ward* [1917] AC 309.

[61] In my judgment, although the defendants have pleaded qualified privilege, it is not clear either from the statement of defence or the affidavit of Dato Kamaludin or the defendants' written submission in what manner the defamatory press statements were made on occasions of qualified privilege. In any case, there are no affidavits deposed by the defendants' themselves to explain how their press statements are protected by qualified privilege. As rightly observed by the learned High Court judge, senior federal counsel Dato' Kamaludin is in no position to depose any affidavit on their behalf to show the existence of circumstances justifying the defence of qualified privilege.

[62] Be that as it may, I know of no authority or principle of law that a defamatory statement to the press by a government officer (the IGP and the AG are government officers) is protected by qualified privilege. Indeed, it is unthinkable that a government officer is at liberty to make defamatory press statements vilifying a person, and when sued by that person for defamation, may successfully invoke the defence of qualified privilege. Surely that cannot and should not be the law. The case of *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58, cited by the appellants, is irrelevant for our purpose. In any case, on the pleadings, at the very least, whether or not facts do exist to justify the defence of qualified privilege should only be determined after a full trial.

[63] Appeal dismissed with costs.

Appeal allowed with costs.

Reported by Kohila Nesan